

01
02
03
04
05
06 UNITED STATES DISTRICT COURT
07 WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

08 GLINN VESSELL,) CASE NO. C08-0949-RSL
09 Plaintiff,)
10 v.) REPORT AND RECOMMENDATION
11 MICHAEL J. ASTRUE, Commissioner)
of Social Security,)
12 Defendants.)
13 _____)

14 Having prevailed in his appeal of a decision by the Commissioner of the Social Security
15 Administration, plaintiff moves for an award of attorney's fees, costs, and expenses under the
16 Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412. (Dkt. 20.) Plaintiff initially
17 requested \$9,040.06 in attorney's fees, \$25.25 in costs, and \$78.22 in expenses, for a total
18 award of \$9,143.53. In response, the Commissioner argues for a reduction in the hours of
19 attorney time requested by plaintiff. (Dkt. 22.) Plaintiff disputes the Commissioner's
20 arguments in reply, concedes a clerical error amounting to \$311.13, and requests an additional
21 \$691.40 for time to prepare the reply brief. (Dkt. 26.) The revised total award sought by
22 plaintiff amounts to \$9,523.79.

01 Having considered the materials submitted in support of and in opposition to plaintiff's
02 motion, the Court recommends that plaintiff's motion (Dkt. 20) be GRANTED in part and
03 DENIED in part and that plaintiff be awarded \$9,402.80 in attorney's fees, expenses, and costs.

04 BACKGROUND

05 Plaintiff filed a claim for Disability Insurance Benefits (DIB) on September 18, 1996.
06 Following a hearing, an Administrative Law Judge (ALJ) found plaintiff not disabled.
07 Plaintiff appealed the decision to the Appeals Council, which vacated the ALJ's decision and
08 remanded the case for further proceedings. Following a second hearing, the ALJ again found
09 plaintiff not disabled and the Appeals Council denied his request for review. The Appeals
10 Council subsequently set aside its denial, but thereafter again denied plaintiff's request for
11 review.

12 On appeal, this Court affirmed the decision in part and remanded the decision in part.
13 *Vessell v. Barnhart*, No. C03-3976-JCC (W.D. Wash. Mar. 30, 2005) (Dkt. 28 at 9). While the
14 case was pending at the hearing office pursuant to the Court's Order, plaintiff appealed part of
15 the decision to the Ninth Circuit Court of Appeals. The Ninth Circuit remanded the matter for
16 further proceedings based on the stipulation of the parties. *Vessell v. Barnhart*, No. 05-35483
17 (9th Cir. Sept. 23, 2005).

18 While the claim was pending with the courts, plaintiff re-filed concurrent applications
19 for Supplemental Security Income (SSI) and DIB on December 15, 2004. The Appeals
20 Council remanded plaintiff's claims to an ALJ for readjudication. The ALJ conducted a third
21 hearing and again denied the claim. Plaintiff timely appealed and the Appeals Council
22 declined to assume jurisdiction.

01 Plaintiff filed a civil action in this Court for review of the Commissioner's final
02 decision. The Court issued a Report and Recommendation that recommended remanding the
03 matter for an award of benefits. (Dkt. 17.) The Court found that the ALJ erred at step five
04 and that the step four presumption of disability dictated an award of benefits. The Court found
05 no merit in plaintiff's remaining arguments, which assigned error to the ALJ's assessment of
06 treating physicians' opinions, plaintiff's credibility, and lay-witness testimony. The
07 Honorable Robert S. Lasnik adopted the Report and Recommendation without objection.
08 (Dkt. 18.)

09 Plaintiff was represented in this matter by Robert Friedman, an attorney in Everett,
10 Washington, and Eric Schnauffer, an attorney in Evanston, Illinois. Both Mr. Friedman and
11 Mr. Schnauffer are highly experienced attorneys in the field of Social Security law. Mr.
12 Schnauffer drafted the briefs in the Social Security appeal.

13 Plaintiff originally sought fees for a total of 52.3 attorney hours. In reply, he
14 acknowledged that the total number of hours for Mr. Friedman should be reduced by 1.8 hours
15 due to a clerical error and requested an additional 4.0 hours for Mr. Schnauffer's time spent
16 preparing the EAJA reply brief, leaving the hours at issue as 3.7 hours for Mr. Friedman and
17 50.8 hours for Mr. Schnauffer, for a total of 54.5 hours. Plaintiff requests that fees be
18 calculated at an hourly rate of \$172.85.

19 The Commissioner contends that plaintiff's attorneys spent on excessive number of
20 hours on this matter, that "block billed" hours lack sufficient detail and should be reduced, and
21 that various tasks billed are clerical and, therefore, not properly reimbursable. He requests that
22 the number of attorney hours be reduced to 36.2 hours, resulting in a fee award of \$6,257.17.

01 DISCUSSION

02 The Court may award EAJA fees for attorney hours reasonably expended by plaintiff's
03 counsel in this matter. 28 U.S.C. § 2412(d)(2)(A). "[E]xcessive, redundant, or otherwise
04 unnecessary" hours should be excluded from the fee award. *Hensley v. Eckerhart*, 461 U.S.
05 424, 434 (1983). The Court must provide a "concise but clear explanation" of its reasons for a
06 fee award. *Gates v. Deukmejian*, 987 F.2d 1392, 1398 (9th Cir. 1992).

07 A. Overall Attorney Hours

08 The Commissioner submits that the number of attorney hours requested are
09 unreasonable for this disability matter. He asserts a consensus of twenty to forty hours as a
10 reasonable amount of time to spend on a social security case that does not present particular
11 difficulty, and denies that the issues in this case were novel or complex. For the reasons
12 described below, the Court does not find the Commissioner's arguments persuasive.

13 First, there is no hard-and-fast cap on attorney fee awards at forty hours that should be
14 applied regardless of the circumstances. *See, e.g., Patterson v. Apfel*, 99 F. Supp. 2d 1212,
15 1214 n.2 (C.D. Cal. 2000) (collecting cases involving reasonable EAJA fee awards between 20
16 and 54.5 hours); *Gibson-Jones v. Apfel*, 995 F. Supp. 825, 827 (N.D. Ill. 1998) (awarding
17 attorney's fees for 65.75 hours of district court litigation). Indeed, this Court has previously
18 approved attorney fee awards in Social Security cases for work exceeding forty hours. *See,*
19 *e.g., Burleson v. Astrue*, C07-2019RSL, Report and Recommendation (Jan. 13, 2009)
20 (recommending a reduced fee award for Mr. Friedman and Mr. Schnauffer for 49.3 hours, which
21 included 43.9 hours for matters related to the underlying litigation and 5.4 hours for the EAJA
22 fee application), *adopted without objections* by Order on Plaintiff's Motion for EAJA Fees

(Feb. 9, 2009); *Riley v. Barnhart*, C04-168JLR, Report and Recommendation (Mar. 8, 2005) (recommending a reduced fee award for Mr. Friedman and Mr. Schnaufer for 49.2 hours, which included 45.2 hours for matters related to the underlying litigation and 4 hours for the EAJA fee application), *adopted without objections* by Order on Plaintiff's Motion for EAJA Fees (Mar. 28, 2005).

Second, the Commissioner does not support his contention that plaintiff's counsel spent an unreasonable amount of time on this matter. Counsel did not simply recycle arguments; rather, counsel provided useful, relevant, and detailed discussions of the facts, authority, and administrative record. Although the Court did not agree with all of plaintiff's arguments, none were frivolous or advanced in bad faith. Additionally, this case involved an unusually large administrative record totaling 1,772 pages, three administrative hearings, two civil actions and a remand from the Ninth Circuit, a thirty-three page, single-spaced decision from the ALJ on remand, and a successful outcome for plaintiff. The number of attorney hours expended was reasonable in light of these factors, and plaintiff is entitled to the attorney's fees, costs, and expenses incurred for the work performed in pursuit of the ultimate result, including efforts expended on unsuccessful issues. *See Hensley*, 461 U.S. at 435 ("Litigants in good faith may raise alternative legal grounds for a desired outcome, and the court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee. The result is what matters.")

B. Block Billing

The Commissioner also objects to the format in which Mr. Schnaufer presents the hours he spent briefing this matter. Mr. Schnaufer indicates he spent various amounts of time, on eight different days, "Draft[ing] Plaintiff's Opening Brief" and "Draft[ing] Plaintiff's Reply

01 Brief[,]” comprising a total of 44.7 hours.¹ (Dkt. 20, Ex. C-1.) The Commissioner states that
02 such block billing “lumps together multiple tasks making it impossible to evaluate their
03 reasonableness.” *Role Models Am. Inc. v. Brownlee*, 353 F.3d 962, 971 (D.C. Cir. 2004). He
04 contends that the lack of detail in the billing justifies a reduction in the hours. *See, e.g.*,
05 *Fischer v. SJB-P.D. Inc.*, 214 F.3d 1115, 1121 (9th Cir. 2000) (district court may reduce fee
06 where request poorly documented) (citing *Hensley*, 461 U.S. at 433). Again, the
07 Commissioner’s argument lacks merit.

08 “[P]laintiff’s counsel ‘is not required to record in great detail how each minute of his
09 time was expended.’” *Id.* (quoting *Hensley*, 461 U.S. at 437 n. 12). “Instead, plaintiff’s
10 counsel can meet his burden - although just barely - by simply listing his hours and ‘identifying
11 the general subject matter of his time expenditures.’” *Id.* (finding denial of fee application an
12 abuse of discretion where the fee request included summaries of tasks such as “pleadings and
13 pretrial motions”) (quoting *Davis v. City of San Francisco*, 976 F.2d 1536, 1542 (9th Cir. 1992)
14 (quoting *Hensley*, 461 U.S. at 437 n. 12)). Here, plaintiff met this “basic requirement.” *Id.*

15 Moreover, the Court has no difficulty evaluating the reasonableness of the request. In
16 fact, it is not clear how much more detail would be necessary to evaluate time entries relating to
17 the researching and writing of opening and reply briefs. Interestingly, the Commissioner has
18 not, to the undersigned’s recollection, raised any such objection to the very same billing
19 practice in numerous EAJA petitions submitted to the Court by plaintiff’s counsel.

20 Nevertheless, the Court recommends reducing the fee award by 0.6 hours for a reason
21

22 ¹ The Commissioner mistakenly calculated a total of 44.4 hours, omitting 0.3 hours Mr. Schnauffer spent drafting plaintiff’s opening brief. (*See* Dkt. 22 at 4 and Dkt. 20, Ex. C-1.)

not addressed by the Commissioner: the time requested for briefing includes some duplication of efforts. Although Mr. Schnauffer drafted the briefs, plaintiff bills for Mr. Friedman's time to edit the opening brief. (Dkt. 23, Ex. B at 1, Ex. C at 1.) It appears duplicative for one highly experienced attorney to charge additional fees simply for reading the work of another highly experienced attorney. Accordingly, while finding plaintiff's request for 44.7 hours for Mr. Schnauffer's briefing reasonable, the Court recommends a deduction of 0.6 hours of Mr. Friedman's time spent editing that briefing.

C. Clerical Matters

The Commissioner also challenges the inclusion of other matters on the time sheets. He contends that 0.9 hours Mr. Friedman spent preparing EAJA documents, 0.4 hours Mr. Friedman spent meeting with assistants to tickle due dates and send appropriate forms, and 0.4 hours Mr. Schnauffer spent drafting an EAJA time record is "purely clerical work or secretarial tasks should not be billed at a paralegal or lawyer's rate, regardless of who performs them." *Missouri v. Jenkins*, 491 U.S. 274, 288 n. 10 (1989). With one small exception, the Court disagrees with the Commissioner.

Initially, the Court notes that any argument that the time spent preparing the EAJA motion (0.5 hours by Mr. Friedman) and the EAJA reply brief (4.0 hours by Mr. Schnauffer) should be rejected. (See Dkt. 20, Exs. B & C; Dkt. 26, Ex. D.)² Plaintiff may be awarded fees for hours reasonably expended in seeking attorney's fees under the EAJA. See *Comm'r, INS v. Jean*, 496 U.S. 154, 162-66 (1990). Here, plaintiff properly seeks reimbursement for a

² Mr. Schnauffer indicates he spent 6.9 hours total on the reply brief, but plaintiff seeks attorney's fees for only 4.0 of those hours. (Dkt. 26, Ex. D.)

01 reasonable number of hours spent on the EAJA briefing.

02 The Commissioner asserts that the time spent preparing the EAJA time records (0.4
03 hours by Mr. Friedman and 0.4 hours by Mr. Schnaufer) constitutes clerical work not properly
04 reimbursable. However, he provides no direct support for this contention. As noted above,
05 plaintiff is entitled to fees for hours reasonably expended in seeking attorney's fees under the
06 EAJA. *Id.* In seeking such fees, "[t]he fee applicant bears the burden of documenting the
07 appropriate hours expended in the litigation and must submit evidence in support of those hours
08 worked." *Gates*, 987 F.2d at 1397 (citing *Hensley*, 461 U.S. at 433, 437). Accordingly, as
09 argued by plaintiff, it would appear to appropriately fall within an attorney's purview to
10 determine the items to include on an EAJA time record and the amounts to seek for each item,
11 and to award fees based on the time spent performing those tasks.

12 The Commissioner also challenges various matters involving Mr. Friedman's assistant.
13 Because the Commissioner does not specifically identify the disputed time entries, it is not clear
14 which of the following entries are at issue:

<u>Date</u>	<u>Hour</u>	<u>Event</u>
5/14/08	0.1	Meet with assistant to send client appropriate forms and set tickle dates.
6/3/08	0.1	File review regarding appeal. Client has not returned forms for appeal. Ask assistant to call client regarding status of forms.
6/4/08	0.1	Meet with assistant. We received forms.
1/8/09	0.1	Meet with assistant regarding client's call for status.
3/9/09	0.1	Read order adopting Report and Recommendation. Advise assistant on calendaring dates.


01 (Dkt. 20, Ex. B-1.) In any event, the Court finds all but one of these entries properly
02 reimbursable.

03 Plaintiff asserts that the above-described tasks constitute time properly spent managing
04 the litigation, including the critical task of ensuring the satisfaction of due dates. With the
05 exception of the 0.1 hours Mr. Friedman apparently spent meeting with his assistant to discuss
06 merely the fact that forms had been received, the Court agrees that the challenged hours do not
07 constitute purely clerical tasks not properly reimbursable, but, rather, necessary
08 litigation-related managerial tasks. Moreover, the minimal amount of time spent on these
09 tasks was reasonable and in some instances also involved the performance of other non-clerical
10 work. As such, while finding the majority of the disputed tasks, like the time spent in relation
11 to the EAJA briefing, both reasonable and compensable, the Court finds it appropriate to deduct
12 0.1 hours of Mr. Friedman's time.

13 SUMMARY AND CONCLUSION

14 Consistent with the discussion above, the Court recommends that plaintiff's motion be
15 GRANTED in part and DENIED in part. It is recommended that the attorney hours claimed by
16 plaintiff be reduced by a total of 0.7 hours. After this reduction, plaintiff would be allowed a
17 total of 53.8 hours for attorney time in this matter (48.5 hours for matters related to the
18 underlying litigation, and 5.3 hours for matters related to the EAJA fee application) at an hourly
19 rate of \$172.85. The total recommended award for attorney's fees would be \$9,299.33.
20 Plaintiff should also be allowed the full amount of his claimed costs (\$25.25) and expenses
21 (\$78.22), for a total award of \$9,402.80. A proposed Order accompanies this Report and
22 Recommendation.

01 DATED this 18th day of September, 2009.

02
03 
04 Mary Alice Theiler
05 United States Magistrate Judge
06
07
08
09
10
11
12
13
14
15
16
17
18
19
20
21
22